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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-347

ORECK CORPORATION, *Petitioner,*

v.

WHIRLPOOL CORPORATION, and SEARS, ROEBUCK & COMPANY, *Respondents.*

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court to reconsider its denial of the petition for writ of certiorari in this case entered on October 30, 1978, and to grant the petition.

While our petition sets forth the errors in the decision below, intervening developments have now demonstrated the pernicious effect which the decision is having and will have, if left unreviewed and uncorrected.

The Second Circuit's deeply-divided decision in this case has quickly become a frequently cited precedent,

used by lower courts to erode important principles of antitrust law. It is regarded as authoritative precedent for at least two retrograde and erroneous propositions: (1) that all non-price vertical restraints are to be tested by the rule of reason, no matter how lacking in justification, and (2) that for a plaintiff such as Oreck to succeed, it must demonstrate injury to the public and adverse impact upon the general market.[1]

1. Vertical Boycott Agreements

This case involves an agreement between a manufacturer, Whirlpool, and its largest customer, Sears, pursuant to which Whirlpool boycotted petitioner Oreck. In a series of lower court cases, the decision below has been taken to stand for the proposition that, unless price is involved, no vertical agreement, no matter how bald-facedly anticompetitive in motive and effect, can be found to be *per se* illegal. *See Gough* v. *Rossmoor, supra at* 75,352 ("In all cases so far holding [concerted

[1] Petitioner has identified twelve cases citing the Circuit Court opinion in Oreck: Dougherty v. Continental Oil Co., 579 F.2d 954 (5th Cir. 1978); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 1978-1 Trade Cas. ¶ 62,064 (3d Cir. May 24, 1978); Gough v. Rossmoor, 1978-2 Trade Cas. ¶ 62,202 (9th Cir. Aug. 9, 1978); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 447 F.Supp. 867 (S.D.N.Y. 1978); All Label Record Service, Inc. v. Mr. Wiggs Dept. Stores, 1978-1 Trade Cas. ¶ 62,073 (N.D. Ohio May 31, 1978); Bernard v. Curtis Circulation, 1978-2 Trade Cas. ¶ 62,141 (E.D.N.Y. June 15, 1978); Petroleum for Contractors, Inc. v. Mobil Oil Corp., 1978-2 Trade Cas. ¶ 62,151 (S.D.N.Y. July 5, 1978); Gerson-Ogden, Inc. v. Avon, Inc., 1978-2 Trade Cas. ¶ 62,271 (S.D.N.Y. Sept. 14, 1978); Hsing Chow v. Union Central Life Insurance Co., 1978-2 Trade Cas. ¶ 62,300 (E.D.N.Y. Sept. 29, 1978); Eiberger v. Sony Corp., 76 Civ. 3677 (S.D.N.Y., filed Oct. 5, 1978); Morse v. Swank, 77 Civ. 5185 (S.D.N.Y., filed Oct. 10, 1978); Hunt v. Mobil Oil Corp., 1978-2 Trade Cas. ¶ 62,301 (S.D. N.Y. Oct. 12, 1978).

refusals to deal] to be *per se* unreasonable, there has been some horizontal concert of action taken against the victims of the restraint."); *Morse v. Swank, supra* ("Oreck Corp. . . . mandates resort to rule of reason, rather than *per se,* analysis in cases of vertical agreements to protect distributors from competition"); *Bernard* v. *Curtis, supra* at 75,036.

In this respect, the decision below and the more recent cases directly conflict with a leading Federal Trade Commission decision, *Tysons Corner Regional Shopping Center,* 85 F.T.C. 970 (1975), holding that the "presence of more than one party at the same distributional level" was not necessary for a *per se* boycott violation (85 F.T.C. at 1010), and with the analysis of boycott law by distinguished commentators.[2] They also misapply this Court's ruling in *Continental T.V.* v. *G.T.E. Sylvania, Inc.,* 433 U.S. 36 (1977). *Continental T.V.* held that the rule of reason applied to vertical non-price restraints where it might be shown that limitation of intrabrand competition was likely to foster interbrand competition. However, no claim whatsoever was made in this case that the Sears-Whirlpool agreement was designed to promote interbrand competition. Where no claim of interbrand benefit is made, there is no reason that an overt and blatant boycott should not be governed by the rule of *per se* illegality because of its "pernicious effect on competition and lack of any redeeming virtue," *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1978).

[2] *E.g.,* R. Bork, *The Antitrust Paradox,* 331-346 (1978), argues that boycott situations should be divided as to whether they are ancillary to a legitimate transaction or naked (as here), and points out the meaningless nature of a vertical-horizontal differentiation. Further, Judge Weinfeld's recent decision in the *Hunt* case indi-

If the Second Circuit's error is left uncorrected, the unwarranted denial of *per se* treatment for vertical boycott agreements will proliferate as shown by the recent opinions cited. Cases in which liability should be summarily determined will turn into tedious and lengthy "big cases", with protracted efforts at justification of practices where, by law, no threshold test of justification can be met. There will be uncertainty and turmoil in the law of boycotts and distribution restraints for an extended period. These results should be obviated by review now.

2. Public Injury

A second error in the decision below, which has been seized upon by other courts, is the Second Circuit's resurrection of the "public injury test" by holding that for petitioner to prevail he would have to show "anticompetitive effect in the industry as a whole." At least five other courts have subsequently followed and cited this case as requiring plaintiffs to show such public injury: *Gough* v. *Rossmoor, supra* at 75,352 ("The conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged."); *Morse* v. *Swank, supra* (". . . the agreement must be 'anticompetitive in purpose or effect,' a phrase the Second Circuit interprets to refer to its effect on the industry as a whole, not the effect on the excluded competitor alone."); *Hsing Chow* v. *Union Central Life Insurance Co., supra; All Label Record Service, Inc.* v. *Mr. Wiggs Dept. Stores, supra* at 74,656 (cites Oreck's requirement of "anticompetitive effect in the . . . industry as a whole"); *Gerson-Ogden, Inc.* v. *Avon Products, Inc., supra; see also Columbia Metal Culvert* v. *Kaiser Aluminum, supra.*

cates his view that the Oreck decision is contrary to the boycott doctrine laid down by this Court in United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) and Fashion Originator's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941). 1978-2 Trade Cas. ¶ 62,301 at 75,870 (fn. 41).

These rulings fly in the face of this Court's decision in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), which held that "public injury" was not a requisite of the plaintiff's proof, and that a group boycott is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. *Id.* at 213. The ruling below creates the paradoxical situation that the smaller a company is, the less likely it is that it can successfully prosecute an action, despite the fact that one major thrust of the antitrust laws is the protection of smaller businesses against anticompetitive actions by their larger competitors.

Again, the ruling below is not only an erroneous application of antitrust law. The adoption of the "public injury" test by other courts would mean that boycott cases would become complex trials with a panoply of issues of market definition and market power, expert testimony, and huge expenditures of resources by courts and parties, contrary to boycott principles and the interests of justice.

CONCLUSION

The errors of the Second Circuit in this case have already become notorious because of their use by lower courts to chip away at well-settled doctrines of antitrust law. Hence, the rulings challenged in the petition

cannot prudently be ignored as an aberration. Their effect has been and will be to distort *per se* principles, to misdirect the law of boycott and vertical restraints, and to undermine this Court's decisions in *Continental T.V.* and in *Klor's*. Certiorari should be granted to halt this disquieting trend and to correct the errors below.

Respectfully submitted,

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